RESPONSE REQUESTED

No. 91-7814

Supreme Court, U.S.
FILED
JUL 8 1992
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JOHNNY LEE MUKES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence was sufficient to support petitioner's conviction for using a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 19-23) is unreported, but the judgment is noted at 952 F.2d 404 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1992. The petition for a writ of certiorari was filed on March 9, 1992. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Tennessee, petitioner was convicted of possession of cocaine with the intent to distribute it, in

violation of 21 U.S.C. 841(a)(1) (Count 1), using a firearm in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1) (Count 2), and possession of a firearm by a previously convicted felon, in violation of 18 U.S.C. 922(g) (Count 3). The district court sentenced him to concurrent terms of 180 months' imprisonment on Counts 1 and 3,[1/] and a consecutive term of 60 months' imprisonment on Count 2, to be followed by a three-year period of supervised release. C.A. App. 14-16. The court of appeals affirmed. Pet. App. 19-23.

1. On September 28, 1989, officers of the Memphis, Tennessee, Police Department executed a search warrant at 1040 Haynes Street in Memphis. They found petitioner, the only occupant of the house, in a rear bedroom. When the officers searched the bedroom, they discovered two plastic bags containing 32.9 grams of cocaine hidden in a sock in a dresser drawer. In the same drawer, the police also found a loaded .38 caliber Derringer pistol and an unloaded .25 caliber automatic pistol. Neither firearm was registered, and one of them had been stolen. A search of the kitchen of the house revealed several items of drug paraphernalia, including scales, a cooking tube used for converting powdered cocaine into crack cocaine, and small bags used for packaging drugs. After petitioner was advised of his rights, he admitted to the officers that the cocaine in the bedroom was his. Pet. App. 20; Gov't C.A. Br. 2-3.

2. The court of appeals affirmed. Pet. App. 19-23. The

1/ Petitioner's four prior felony convictions made him subject to an enhanced penalty on Count 3 under 18 U.S.C. 924(e). See C.A. App. 17-18.

court concluded that "a rational jury could have concluded that [petitioner's] drugs and the guns were being kept in the same place to facilitate the protection of the former by the latter." Pet. App. 21. Although possession of a drug with the intent to distribute it "'is in a sense a passive crime', * * * it is not analytically impossible for someone to use a gun in relation to the passive possession of drugs before the drugs are distribu-ted." Ibid. (quoting United States v. Bruce, 939 F.2d 1053, 1055 (D.C. Cir. 1991)). The court also observed that a drug dealer could "use" a firearm in relation to his drug crime by "keep[ing] a loaded weapon with his drugs for the purpose of protecting his inventory." Pet. App. 21.[2/]

ARGUMENT

Petitioner contends (Pet. 8-17) that the evidence was insufficient to show that he used a firearm during and in relation to a drug trafficking crime. That contention is without merit.

The evidence at trial was sufficient to permit a rational jury to conclude that petitioner "used" a firearm to facilitate his crime of possession of cocaine with intent to distribute it. Petitioner conceded that the 32.9 grams of cocaine discovered in the dresser drawer was his, and the evidence was clear that the same dresser drawer contained a loaded .38 caliber pistol and an unloaded.25 caliber pistol. The presence of two firearms, one of them loaded and ready to fire, in close proximity to a large

2/ The court of appeals rejected other contentions that petitioner has not renewed in this Court. Pet. App. 22-23.

quantity of illegal narcotics suggests that petitioner strategically placed the firearms so that they would be easily accessible for use during a drug transaction. Thus, there was a substantial nexus between the firearms and petitioner's crime of drug trafficking.

In addition to the court below, see Pet. App. 21, other courts of appeals have relied on the proximity between firearms and cocaine as evidence that the defendant intended to use the firearms for protection during a drug transaction. See United States v. Beverly, 921 F.2d 559, 563 (5th Cir.), cert. denied, 111 S. Ct. 2869 (1991); United States v. Moore, 919 F.2d 1471, 1475 (10th Cir. 1990), cert. denied, 111 S. Ct. 2812 (1991); United States v. Keene, 915 F.2d 1164, 1169 (8th Cir. 1990), cert. denied, 111 S. Ct. 1001 (1991); United States v. Robinson, 857 F.2d 1006, 1010 (5th Cir. 1988); see also United States v. Meggett, 875 F.2d 24, 28-29 (2d Cir.), cert. denied, 493 U.S. 858 (1989). Petitioner "used" the firearms because he kept them in a position to be available to protect his drug supply.

Contrary to petitioner's suggestion (Pet. 11), there is no conflict between the decision below and the decisions of the District of Columbia Circuit in United States v. Long, 905 F.2d 1572, 1578, cert. denied, 111 S. Ct. 365 (1990), the Second Circuit in United States v. Feliz-Cordero, 859 F.2d 250, 254 (1988), and the Eighth Circuit in United States v. Duke, 940 F.2d 1113, 1119 (1991). In Long and Feliz-Cordero, there was no evidence that the firearms in question were related to any of the drug trafficking

offenses charged in the indictments. The firearm in Long was unloaded and was found between the cushions of a sofa in a one-room apartment where Long's co-defendant lived. Although the apartment, in which Long and several other persons were arrested, contained drugs and drug paraphernalia, there was no evidence that Long had actually or constructively possessed the firearm, or that he even knew of its existence. 905 F.2d at 1576. Moreover, Long was not the owner or occupant of the apartment in which the firearm was found. The Long court accordingly concluded that the government had failed to show a sufficient nexus between Long and the firearm. Id. at 1577.

In Feliz-Cordero, the police found a firearm in a bedroom dresser drawer in an apartment in which drug records, about $11,000 in cash, a beeper, and a small amount of cocaine were also found. However, there was no evidence that any of the defendants processed or distributed drugs in that apartment; instead, they distributed cocaine from another apartment in the same building. The court of appeals reversed the defendants' convictions under Section 924(c)(1) upon finding that "there is no basis to conclude that the gun [in the bedroom dresser drawer] would have been quickly accessible if needed." Id. at 254.

In subsequent decisions, the Second Circuit has confirmed that its reversal of the conviction in Feliz-Cordero was based on "the absence of proof that the defendants * * * placed the weapon to have it available for ready use during the transaction." United States v. Meggett, 875 F.2d at 29; United States v. Torres, 901

F.2d 205, 217-218 (2d Cir.) (evidence that gun was found under mattress in apartment used for drug trafficking was sufficient to sustain conviction under Section 924(c)(1)), cert. denied, 111 S. Ct. 273 (1990); United States v. Alvaredo, 882 F.2d 645, 653, 654 (2d Cir. 1989) (upholding conviction based on evidence that guns were found in desk drawer and locked safe in apartment used for processing and selling cocaine), cert. denied, 493 U.S. 1071 (1990).

In United States v. Duke, supra, the Eighth Circuit upheld the defendant's conviction under Section 924(c)(1) and articulated a standard equivalent to the one used by the court in this case. The Long court noted that a weapon could be "used" in connection with a drug-trafficking crime even if it was not actually brandished or discharged. The "'presence and availability [of the firearm] in light of the evident need demonstrates the use.'" Duke, 940 F.2d at 1118, quoting United States v. La Guardia, 774 F.2d 317, 321 (8th Cir. 1985).

In the present case, the firearms (one of them loaded and ready to fire) were found in close proximity to a large quantity of cocaine owned by petitioner. The proximity of the firearms to a distribution-sized amount of cocaine in an area under the sole dominion and control of petitioner supplied the nexus that was present in Duke, but absent in Long and Feliz-Cordero. The facts in this case thus come within Long's requirement that a defendant must have actual or constructive possession of a firearm in order to "use" it, 905 F.2d at 1578-1579, and the requirement in Feliz-

Cordero that the gun be in such a location that it would have been quickly accessible if needed during a drug transaction, 859 F.2d at 254.[3/] The firearms were placed in a position to provide protection for petitioner's stash of cocaine. Because petitioner's conviction would be affirmed under the law of every circuit, there is no conflict in authority necessitating this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1992

3/ We therefore disagree with the court of appeals' passing comment that the holding here is "difficult to reconcile" with Feliz-Cordero. Pet. App. 22.